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August 14, 1996

BY OVERNIGHT MAIL

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 96-149

Dear Mr. Caton:

Enclosed for filing please find an original plus thirteen (13) copies (two of which are marker "Extra Public Copy") of the Comments of Frontier Corporation in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned.

Very truly yours,

Michael J. Shortley, III

cc: International Transcription Service

Ms. Janice Myles (diskette)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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AUG 15 1996

FEDERAL COM UNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended;	)	
	)	
and	)	CC Docket No. 96-149
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

COMMENTS OF FRONTIER CORPORATION

Michael J. Shortley, III

Attorney for Frontier Corporation

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Rochester, New York 14646
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August 14, 1996

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Summary

Frontier, on behalf of its incumbent local exchange, competitive local exchange and interexchange subsidiaries, submits these comments in response to the Commission's Notice in this proceeding. In these comments, Frontier will principally address three issues raised in the Notice: the structural treatment of Bell company provision of in-region interexchange services; whether such services should be subject to dominant carrier regulation; and whether the Commission should alter the existing regulatory treatment governing the provision of interexchange services by non-Bell exchange carriers or their affiliates.

With respect to the Bell companies, the Commission must strictly enforce the structural separation and non-discrimination and marketing provisions of sections 271 and 272 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Full compliance with these requirements -- together with satisfaction of the competitive checklist set forth in section 271(c)(2)(B) -- represents the essential *quid pro quo* for Bell company entry into the in-region, interexchange business. At a minimum, the Commission should: impose structural separation requirements no less rigorous than those that apply to the non-Bell exchange carriers and that now apply to the Bell companies' provision of out-of-region interexchange services in order to qualify for non-dominant regulation; and fully enforce the non-discrimination and marketing provisions set forth in sections 271 and 272 of the Act.

The Commission should also subject the provision of such services to dominant carrier regulation. Given their unique geographic scope and ubiquity and the enormous customer bases served by these companies, their strategic dominance over an essential input into the provision of interexchange services -- access -- fully justifies dominant carrier regulation.

Finally, there is no reason for the Commission to alter the existing regulatory framework governing the interexchange operations of the non-Bell exchange carriers. The Fifth Report and Order -- which sets forth the requirements for non-dominant treatment of such services -- have worked well. The Notice itself -- as well as existing Commission precedent -- also provide compelling reasons why the Commission should not alter its existing regulatory framework.

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COMMENTS OF FRONTIER CORPORATION

Introduction

Frontier Corporation ("Frontier"), on behalf of its incumbent local exchange, competitive local exchange and interexchange subsidiaries, submits these comments in response to the Commission's Notice in this proceeding.[1] In these comments, Frontier will principally address three issues raised in the Notice: the structural treatment of Bell company provision of in-region interexchange services; whether such services should be subject to dominant carrier regulation; and whether the Commission should alter the existing regulatory treatment governing the provision of interexchange services by non-Bell exchange carriers or their affiliates.

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1 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Dkt. 96-149, Notice of Proposed Rulemaking, FCC 96-308 (July 18, 1996) ("Notice").

With respect to the Bell companies, the Commission must strictly enforce the structural separation and non-discrimination and marketing provisions of sections 271 and 272 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). Full compliance with these requirements -- together with satisfaction of the competitive checklist set forth in section 271(c)(2)(B) -- represents the essential *quid pro quo* for Bell company entry into the in-region, interexchange business. At a minimum, the Commission should: impose structural separation requirements no less rigorous than those that apply to the non-Bell exchange carriers[2] and that now apply to the Bell companies' provision of out-of-region interexchange services[3] in order to qualify for non-dominant regulation; and fully enforce the non-discrimination and marketing provisions set forth in sections 271 and 272 of the Act.

The Commission should also subject the provision of such services to dominant carrier regulation. Given their unique geographic scope and ubiquity and the enormous customer bases served by these companies, their strategic dominance over an essential input into the provision of interexchange services -- access -- fully justifies dominant carrier regulation.

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2 *Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Dkt. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) ("Fifth Report and Order").

3 *Bell Company Provision of Out-of-Region, Interstate, Interexchange Services*, CC Dkt. 96-21, Report and Order, FCC 96-288 (July 1, 1996).

Finally, there is no reason for the Commission to alter the existing regulatory framework governing the interexchange operations of the non-Bell exchange carriers. The Fifth Report and Order -- which sets forth the requirements for non-dominant treatment of such services -- have worked well. The Notice itself -- as well as existing Commission precedent -- also provide compelling reasons why the Commission should not alter its existing regulatory framework.

Argument

I. THE COMMISSION SHOULD IMPOSE STRINGENT SAFEGUARDS ON BELL COMPANY PROVISION OF IN-REGION, INTEREXCHANGE SERVICES.

Sections 271-272 of the Act establish the essential *quid pro quo* for Bell company entry into the in-region, interexchange business. In order to fulfill the Act's mandate, the Commission must adopt regulations that fully implement these provisions. Toward this end, the Commission should apply structural separation requirements -- until those provisions of the Act sunset -- that fully implement the requirements of the Act and enforce fully the non-discrimination and marketing provisions of sections 271 and 272.

A. The Commission Should, at a Minimum, Establish Initial Structural Separation Requirements That Fully Implement the Act's Mandate.

Section 272(b) contains specific provisions that govern the degree of structural separation required between the Bell companies' exchange and interexchange operations until those provisions sunset. For the most part, those requirements are self-explanatory.[4] Unlike sections 272(b)(2)-(5), section 271(b)(1) is less specific. It requires that the Bell companies' interexchange affiliates operate independently from the entities performing exchange carrier operations.[5] The Commission correctly concludes that this requirement adds to those contained in sections 272(b)(2)-(5).[6]

This independence requirement must mean, at a minimum, that the Bell company affiliate must comply with the requirements of the Fifth Report and Order. That order requires that, in order to qualify for non-dominant treatment,[7] a non-Bell company's interexchange operations be conducted through an affiliate that: (a) maintains separate books of account; (b) may not jointly own transmission or switching facilities with the exchange carrier; and (c) must obtain exchange services at tariffed rates and conditions.[8] These constitute the minimum terms and conditions necessary to implement the independence requirement.

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4 Sections 272(b)(2)-(5) require the Bell companies' interexchange operations to maintain separate books; have separate officers, directors and employees; not permit creditors to have recourse to exchange assets; and conduct all affiliated transactions on an arm's-length, written basis. The Commission's proposals to implement those requirements of the Act are reasonable and should be adopted.

5 47 U.S.C. § 272(b)(1).

6 Notice, ¶ 57.

7 Frontier addresses dominant versus non-dominant treatment in Parts II and III, *infra*.

8 Fifth Report and Order, 98 FCC 2d at 1198, ¶ 9.

The first is required by the explicit terms of section 272(b)(2). The second is necessary to ensure that a Bell company interexchange affiliate must -- like all of its competitors -- invest its own capital and devote its own resources to the interexchange business. Only in this manner may the Commission ensure that the Bell interexchange affiliate faces its own costs of doing business and faces the same investment risks as its in-region competitors. The third condition is a necessary complement to the non-discrimination requirements of section 272(c).[9]

The imposition of these requirements are essential if the Commission is to implement the Act's interim structural separation requirement sunset -- leverage their dominant position in the provision of an essential upstream service -- access -- to disadvantage their competitors in the interexchange business.[10]

B. The Commission Should Enforce Fully The Non-Discrimination and Marketing Provisions of Sections 271 and 272.

As is true with the Act's structural separation requirement, most of the non-discrimination and marketing provisions of sections 271 and 272 are relatively clear. Collectively, they require the Bell companies to transact business with unaffiliated entities

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9 The Commission requests comment on whether the more stringent *Computer II* requirements should apply to the Bell companies' in-region, interexchange services. Notice, ¶ 59. Frontier does not believe that the additional restrictions (principally prohibitions against the shared use of real estate, computer facilities and software development, *id.*, ¶ 58) are necessary for those Bell companies not subject to price-cap sharing or lower formula adjustment requirements or comparable adjustments at the state level. In these circumstances, the incentive to engage in cost misallocations is relatively minimal. Where these conditions do not exist, the Commission should insist upon full *Computer II* structural separation.

10 *See also infra* Part III.

on terms and conditions no less favorable than those under which they transact business with their own affiliates.

The Commission should construe these sections broadly and develop the appropriate enforcement tools to ensure compliance. Under sections 272(c)(2) and (c)(4), for example, a Bell company may not provide "facilities, services or information concerning its provision of exchange access" to its affiliate unless such items are offered on the same terms and conditions to unaffiliated competitors. The Commission should interpret the phrase "facilities, services or information" to encompass all items that fall within the ambit of the phrase.[11] This would include, not only tariffed access elements, but also the provision of non-tariffed services and information (to the extent not already precluded the Commission's structural separation requirements), such as business office services, computing services, customer information and the like. This is necessary to forestall some of the more subtle forms of discrimination in which the Bell companies could otherwise engage.

Similarly, the Commission should interpret the marketing requirements of section 272(g)(1) -- which prohibits the Bell company affiliate from marketing telephone service provided by the Bell exchange carrier unless "that company permits other entities offering the same or similar service to market and sell its telephone exchange services"[12] --

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11 Notice, ¶¶ 9, 87, 89.

12 47 U.S.C. § 272(g)(1).

expansively. This provision must, of necessity, be read in conjunction with the Act's resale mandate contained in section 251(c)(4). As the Commission has recognized:

> Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks.[13]

Resale will also enhance the ability of new entrants to offer one-stop shopping. To avoid frustrating the Act's resale provision, the Commission should, at a minimum, preclude the Bell company interexchange affiliate from marketing any telephone exchange services -- through resale, agency arrangements or otherwise -- that are not available to unaffiliated entities on the same terms and conditions.

II. THE COMMISSION SHOULD SUBJECT THE BELL COMPANIES' PROVISION OF IN-REGION, INTEREXCHANGE SERVICES TO DOMINANT CARRIER REGULATION.

In its *Out-of-Region* Order, the Commission permitted the Bell companies to be treated as non-dominant with respect to their provision of out-of-region interexchange services upon compliance with the requirements of the Fifth Report and Order. With respect to such services, a Bell company does not possess market power with respect to an essential input in the provision of such services, namely, access services. That situation, obviously, does not exist with respect to the provision of interexchange services

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[13] Report No. DC 96-75, *Commission Adopts Rules To Implement Local Competition Provisions of the Telecommunications Act of 1996* at 5 (Microsoft Internet Version August 1, 1996).

originating within their telephone service territories. There, each Bell company possesses a virtual monopoly in the provision of access services in substantial portions of each state in which it provides telephone service. This dominant position -- together with the expensiveness and virtual ubiquity of the territory covered compels the conclusion that the Commission should regulate the Bell companies as dominant with respect to in-region, interexchange services. As the Commission correctly notes,[14] this dominant position in an essential upstream market would provide the Bell companies with every incentive and with the ability to raise the costs or degrade the quality of access services provided to their rivals. The scope and size of the Bell companies' exchange operations provide them with the necessary leverage to disadvantage their rivals substantially throughout large swaths of the country. Dominant carrier regulation is essential to prevent this outcome.

Nor is this conclusion altered by the observations that a Bell company will enter the in-region, interexchange business with zero market share or that their interexchange operations will pay the same access charges as do their competitors. The Commission correctly observes that this type of market share statistic is misleading, at best, when the company in question controls a key input into the service in question -- as is undeniably the case here.[15]

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14 Notice, ¶ 125.

15 *Id.*, ¶ 133.

That the same tariffed access charges will apply to both the Bell companies and to their competitors is equally irrelevant. Different types of network configurations -- *e.g.*, switch locations, type and speed of transmission facilities and the like -- can result in the Bell companies' interexchange operations paying a lower effective rate for access services than their competitors do -- particularly, smaller competitors. With access accounting for approximately forty percent of an interexchange carrier's costs of doing business, even small variations in the effective access rate can have substantial competitive effects.

In these circumstances, dominant carrier regulation of the Bell companies' in-region, interexchange services is amply justified.

III. THE COMMISSION SHOULD DECLINE TO ALTER THE CURRENT REGULATORY TREATMENT OF INTEREXCHANGE SERVICES PROVIDED BY THE NON-BELL EXCHANGE CARRIERS.

Interexchange services provided by the non-Bell exchange carriers have historically been subject to non-dominant regulation so long as the affected company complies with the requirements of the Fifth Report and Order.[16] The Commission inquires as to whether it should alter this regulatory regime.[17] At a minimum, the Commission should not impose any more stringent requirements than currently exist. In addition, the Commission should

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[16] *See id.*, ¶ 108.

[17] *Id.*, ¶¶ 153-59.

eliminate whatever separation requirements it adopts or maintains no later than the Act's separation requirements that apply to the Bell companies sunset.

The Act, Commission precedent and the Commission's own analysis in the Notice provide ample justification for differential treatment of the Bell and non-Bell companies' provision of interexchange services. The Act itself recognizes this basic distinction. Title I, Part III of the Act contains the essential *quid pro quo* for Bell company entry into businesses previously forbidden to them by the Modification of Final Judgment ("MFJ"). Those restrictions never applied to the non-Bell exchange carriers. Moreover, as the Commission observes,[18] the Act did not alter application of the Fifth Report and Order's separation requirements to the non-Bell exchange carriers. In addition, the Act specifically exempts small telephone companies from mandatory implementation of the section 251 interconnection, unbundling and resale requirements[19] and provides that exchange carriers serving less than two percent of the nation's access lines may petition the affected state commission for suspension or modification of such requirements.[20]

The Commission has historically recognized the differences between large exchange carriers and their smaller counterparts. The Commission, for example, declined

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18 *Id.*, ¶ 155.

19 47 U.S.C. § 251(f)(1).

20 47 U.S.C. § 251(f)(2).

to apply either its customer premises equipment[21] or its cellular[22] structural separation rules to the non-Bell exchange carriers. In each of these cases, the Commission correctly concluded that the costs of compliance would outweigh any benefits that could be gained thereby.

In the Notice itself, the Commission recognizes that there are significant differences between the Bell companies and smaller exchange carriers for purposes directly relevant here. As the Commission notes, "[t]he BOCs' local exchange and exchange access facilities extend over much larger geographic areas than the independent LECs' facilities."[23] This larger geographic scope of operations of the Bell companies provides a significant justification for differential regulatory treatment of the Bell and the non-Bell companies' interexchange operations. Because of the small geographic scope of the non-Bell companies' exchange operations, any cost misallocations or discriminatory conduct would have only a *de minimis* competitive effect. Thus, there is no basis for applying the more stringent requirements of sections 271 and 272 of the Act that are applicable to the Bell companies to the non-Bell companies.

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21 *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1976), *recon.*, 84 FCC 2d 50 (1980), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

22 *See* 47 C.F.R. § 22.903.

23 Notice, ¶ 147.

Finally, by their terms, the structural separation requirements applicable to the Bell companies will eventually sunset.[24] No later than such time, the Commission should eliminate the Fifth Report and Order's separation requirements that apply to the non-Bell companies, while maintaining non-dominant regulatory treatment of such services. There is no justification for treating interexchange services provided by the non-Bell exchange carriers more strictly -- or even as strictly -- as the Commission treats interexchange services provided by the Bell companies.

Conclusion

For the foregoing reasons, the Commission should act upon the proposals contained in the Notice in the manner set forth herein.

Respectfully submitted,

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August 14, 1996

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24 47 U.S.C. § 272(f)(1).